No. 90.

NOV 19 1902
JAMES H. McKENNEY,
Clerk

Brief of Kirlin & Hickox for Co

SUPREME COURT OF THE UNITED STATES

Filed Nov. 11, 1902.

OCTOBER TERM, 1902

No. 90

Anton Mencke

Libelant-Petitioner

against

A Cargo of Java Sugar, *ex* Ship Benlarig

James N. Jarvie *et al.*

Claimants

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE LIBELANT-PETITIONER

CONVERS & KIRLIN

Proctors for Libelant-Petitioner

J. PARKER KIRLIN

CHARLES R. HICKOX

Of Counsel

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

ANTON MENCKE, Libelant, Petitioner, AGAINST A Cargo of Java Sugar ex-Ship BENLARIG, JAMES N. JARVIE *et al.*, Claimants.	No. 90

BRIEF FOR LIBELANT-PETITIONER.

This cause is before the Court pursuant to a writ of *certiorari* issued to the United States Circuit Court of Appeals for the Second Circuit.

The action was begun by the filing of a libel on May 27, 1899, in the United States District Court for the Eastern District of New York by the master of the British ship Benlarig, against a cargo of sugar that had just been delivered from the vessel, to recover an unpaid balance of freight due for carrying the sugar from Java to New York (pp. 1–13).

The receivers of the cargo, the claimants in this action, had deducted from the freight the cost of

lightering the cargo from the dock where it had been discharged to the claimants' refinery, which was above the Bridge. The ship had been ordered by the claimants to proceed directly to the refinery, but had been unable to do so because the height of her masts was such that she could not pass under the Bridge.

The District Court, Judge Thomas, entered a decree in favor of the libelant, January 18, 1900, (pp. 85, 86; 99 Fed. R. 298).

The claimants duly appealed to the United States Circuit Court of Appeals for the Second Circuit, who, on April 16, 1901, reversed the decree and remanded the cause with instructions to dismiss the libel (p. 92; 108 Fed. R. 87). The libelant then petitioned this Court for a writ of *certiorari* and the present writ was granted on May 13, 1901 (181 U. S., 620).

These are the facts :

The ship Benlarig was chartered under a charter-party dated London, July 1, 1898, between Watson Brothers, her owners, and Erdmann & Sielcken, merchants of Batavia, Samarang and Sourabaya.

The charter-party provided that the Benlarig should load at Java " a full and complete cargo of dry sugar in baskets and /or in bags " " and being so loaded * * * shall (unless ordered to a direct port of discharge on signing last bills of lading) therewith proceed to Barbadoes, thence to Queenstown or Falmouth (as directed by chaterers or their agents) for orders, to discharge

always afloat, either at a *safe* port in the United Kingdom or on the Continent of Europe between Havre and Hamburg (both included), Rouen excluded, or at option of charterers to order vessel from Barbadoes to proceed to Delaware Breakwater for orders to discharge at New York or Boston or Philadelphia or Baltimore, *or so near the port of discharge as she may safely get* and *deliver the same, always afloat*, in a customary place and manner, in such dock, as directed by charterers, agreeably to Bills of Lading." * * * (*Rec.*, pp. 3, 4).

The charter party further provided Section 4:

"All goods to be brought to and taken from alongside of the ship, always afloat, *at the said charterers' risk and expense*, who may direct the same to the most convenient anchorage; *lighterage*, if any, *to* reach the port of destination, or *deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding*" (*Rec.*, p. 5).

The Benlarig duly loaded a full cargo of sugar in Java as provided by the charter-party (*Ans.*, p. 13), and then proceeded to Barbadoes. She was there ordered to proceed to New York, which she did directly (*Meucke*, p. 17).

Bills of lading or receipts had been issued at the ports of loading, reciting the shipment of the quantities of sugar noted in the margin thereof. All the bills of lading contained the identical conditions that the sugar was "to be *delivered* in the like order and condition at the port of discharge *as per charter-party* dated London 1st July, 1898

(the dangers of the seas excepted) unto Messrs. Winter & Smillie as agents or to their assigns, he or they paying freight for the said sugar as per charter-party. General average, if any, to be settled according to York-Antwerp rules 1890. *All other conditions and exceptions*, negligence and Harter Act clauses included, *as per charter-party* above referred to with average accustomed" (*Libelant's Ex.* 3, 4, 5 and 6; pp. 17–20).

Before or about the time of the arrival of the Benlarig at the port of New York the cargo and the ship's documents, including the above mentioned charter-party and bills of lading, were sold and transferred by their owners to the firm of Arbuckle Brothers (*Ans.*, p. 13, *Gilmour*, p. 79). This firm claimed to be the owners of the cargo and were in possession of the charter-party and bills of lading on the ship's arrival (*Gilmour*, pp. 78, 79). The delivery of the sugar was made to Arbuckle Brothers (*Ans.*, p. 13).

The vessel arrived at New York on April 14, 1899, and on April 15, notice of her arrival and entry at the Customs House, together with a request for orders for a discharging berth, were sent to the claimants by the vessel's agents (*Libelant's Ex.* 9, p. 22). At the same time the claimants were notified that the vessel's masts being in one piece would not admit of her passing under the Brooklyn Bridge (p. 22).

Notwithstanding this notice, the claimants, after conferring with their London house (*Libelant's Ex.* 10, p. 23), gave the vessel orders to dis-

charge at their refinery at the foot of Pearl street, Brooklyn (*Libelant's Ex.* 7, p. 21). The place of discharge thus selected by the receivers, who stood in the position of the charterers, was above the Brooklyn Bridge.

The clear height of the central span of the Brooklyn Bridge above mean high water is 135 feet (*Martin*, p. 135).

The average rise and fall of the tide from 1893 to and including 1898 was 4.5 feet (*Spaulding*, p. 38). The daily tide record from April 15 to May 2 is before the Court (*Spaulding*, pp. 37–38). This record shows that the actual rise and fall did not vary materially from the average or mean rise and fall.

At dead low water, therefore, there were not more than 140 feet in the clear at the highest point.

The Benlarig is a three-masted, square-rigged ship (*Mencke*, p. 33). She had three steel masts, built up solid from the bottom to the top. They were constructed of cylindrical steel plates, riveted together with internal angle iron braces.

There was no way of taking any part of the masts down (*Mencke*, p. 28).

The mainmast was 139 feet 10 inches above the deck. The deck at that point was 5 feet 2½ inches above the deep water load line. The total height of the mainmast above the load line was therefore 145 feet ½ inch (*Mencke*, p. 27).

The foremost was 136 feet 8 inches above the deck, but the height of the deck above the water

line at that point is 7 or 8 feet, so that the height of the foremast was 143 feet 8 inches, or 144 feet 8 inches above the load line, or within several inches of the height of the mainmast (*Meucke*, p. 27).

The mizzenmast was 129 feet above the deck, and the deck was 7 feet above the load line. The mizzenmast thus was 136 feet above the water line (*Meucke*, p. 27).

On this occasion the vessel was loaded down to her Plimsol line (*Meucke*, pp. 30, 33).

The ship, therefore, required 145 feet of clear space in order to pass underneath the Bridge. This was 5 feet more than the height in the clear of the highest point of the Bridge when the tide was at the lowest point of the ebb. An additional margin of several feet probably would have to be allowed on account of disturbance or movement of the water. At dead low water, therefore, the Benlarig could not pass under the Bridge without cutting off 8 or 10 feet from her steel masts.

This was a mutilation to which it was thought the charterers could not properly subject the ship.

Accordingly on receipt of the claimants' orders on April 15th (*Libelant's Ex.* 7, p. 21), the vessel's agents again notified the claimants that it was impossible for the ship to pass under the Bridge, and they asked for further orders for a discharging berth (*Libelant's Ex.* 11, p. 23). No immediate reply was received to this request, and on April 18th the ship's agents again wrote to the

claimants asking for another discharging berth and adding that in default thereof the cargo would be discharged at some safe point below the Bridge and would then be lightered to the dock already designated by the claimants. The agents further stated:

"If this be your determination, please name the point and send the lighter. We shall look to you and the cargo to pay lighterage in accordance with clause No. 4 of the charter-party" (*Libelant's Ex.* 13, p. 25).

The claimants then gave orders for the Benlarig to go to West Central Pier, Atlantic Dock, below the Bridge, to which place they stated that they would send lighters to take the sugar from the vessel to the refinery. They also gave notice at the same time:

"We do this in order to save any further delay in discharging vessel, but we beg to distinctly advise you that this action of ours does in no way prejudice our position as regards liability for the lighterage expenses of the cargo, which we claim, under the Charter-Party, is payable by the Ship and her owners. The question as to the parties liable for expenses of lighterage can be settled later, but we distinctly disclaim all liability" (*Libelant's Ex.* 12, p. 24).

It was finally agreed that the discharge of the cargo into lighters at the West Central Pier should be without prejudice to the rights of either party under the charter and without waiver of the ship's lien on the cargo for the balance of freight or of the claimants' contention that the ship was bound to go above the Bridge, or to pay the cost

of lighterage if she unloaded below it (*Ans. to 2nd Int.*, p. 15.).

The cost of the lighterage was $1,466.12. This sum was paid by the claimants and a like amount was deducted by them from the freight (*Gilmour*, pp. 75, 79).

In this suit to recover the balance of freight so withheld, the sole controversy is as to which party should pay these lighterage charges, assuming that the ship could not pass under the Bridge without cutting at least two and probably her three masts, and that she declined to accept orders to discharge her cargo above the Bridge for that reason (*Libelant's Ex. 13*, p. 25).

The libelant's contention is that :

(1.) The right of the receivers, under the clause of the charter-party heretofore quoted (*ante*, pp. 2, 3), to select the dock for the discharge was subject to the limitation that such dock must be one that was safe and suitable for the ship as well as for the cargo and one to which the ship could proceed without hindrance by permanent obstacles, which she could not pass without being mutilated, crippled or dismantled.

(2.) Under clause 4 of the charter-party (*ante*, p. 3), any lighterage necessary to deliver the cargo at the port of destination must be paid by the charterers.

The claimants, in effect, contend that :

(1.) Their right under the charter-party was so

absolute that they could designate a dock above the Bridge although the Bridge was too low for the vessel to pass thereunder.

(2.) The ship was bound to deliver her cargo at the designated dock even though her masts should have to be cut to enable her to reach the dock, or in the alternative that the vessel should have the cargo lightered to the dock at her own expense.

(3.) That by the custom of the port the lighterage clause in the charter-party does not mean what it says.

The District Court, Judge Thomas, sustained the libelant's contention and said, with respect to the clause giving the charterers the right to designate the port and dock of discharge (p. 83):

"The evident intention is that the ship shall go to the designated port, if she can get there in safety, and the continuing thought seems to be, that she shall deliver the goods in a dock designated by the charterers, in a customary place and in a customary manner. Any intelligent construction would seem to demand that the ship would not be ordered to a dock where it would be unsafe for her to go, whether the danger arose from the depth of water, or any other cause."

The Court held further that the lighterage clause, Section 4, was explicit (p. 83); that lighterage was necessary for the purpose of delivering the cargo after the ship reached the port of destination (p. 83); that the stipulation was clear and unambiguous that the receivers of the cargo should pay the cost of the lighterage (p. 84). Accordingly a decree was rendered for the libelant (pp. 85, 86).

The Court of Appeals approved the findings of fact of the District Court (pp. 88, 89), and they further found that there was no custom in the port of New York respecting the course to be pursued by vessels which are directed to discharge above the bridge, but which have immovable masts too high to permit a passage under the bridge (p. 89). Instances of such vessels are rare (p. 90).

The Court, however, by Shipman, *J.*, differed from the District Court's conclusions, and assumed and found that the dock to which the vessel was ordered was a safe one, where she could be always afloat, and a customary place for the discharge of sugar (p. 90). But the Court did not find that it would have been possible for the Benlarig to reach the dock safely.

As to the lighterage clause, the Court held that it was a well known provision, and they deduced a reason for its insertion originally in charter-parties: that the clause contemplated cases where there was an obstruction that affected vessels generally, and this was not such a case; but that the Brooklyn Bridge might be regarded as such an obstruction if it affected a sufficiently large proportion of vessels (p. 91). It was not indicated, however, just when the Rubicon would be reached, nor how many vessels like the Benlarig, with a similar charter clause, would have to come to the port, nor how often, before the clause would become operative on one of the vessels. It sufficed the Court that though the clause in its language fitted the present case, yet, in their opinion, the "spirit"

was antagonistic, and its influence was so potent that it nullified the language (p. 91); all application of the clause was, in effect, denied, and the decree of the lower Court was reversed (p. 92).

FIRST POINT.

THE RECEIVERS' RIGHT UNDER THE CHARTER-PARTY TO SELECT A DOCK IS NOT ABSOLUTE AND UNRESTRICTED. THE DOCK SELECTED MUST BE SAFE AND SUITABLE FOR THE SHIP, AND ONE THAT SHE CAN *SAFELY* REACH.

The clause in the charter-party under which the Receivers claim the right to require the ship to dock above the Bridge is printed at pp. 2 and 3 of this brief. The material parts are here repeated:

"To discharge always afloat, either at a safe port in the United Kingdom or on the Continent of Europe, between Havre and Hamburg, both included, Rouen excluded, or at option of charterers to order vessel to Barbadoes to proceed to Delaware Breakwater for orders to discharge at New York or Boston or Philadelphia or Baltimore, or so near the port of discharge as she may safely get, and deliver the same always afloat, in a customary place and manner, in such dock as directed by charterers agreeably to bills of lading" (p. 4).

The bills of lading to which reference is made in this clause provide that the cargo is to be delivered "as per charter-party" on payment of freight, etc. "All other conditions and exceptions * * * as per charter-party, dated Lon-

don, 1st July, 1898." The fact that the charter-party is referred to by its date makes the reference even more specific than if it had been merely part of the general printed form in the bills of lading and shows that the parties to the bills of lading had this particular charter clearly in mind.

The terms of the charter-party, therefore, are directly brought to the notice of the holders of the bills of lading, and so far as the conditions and exceptions of the charter are pertinent to the selection of the place of discharge, the claimants as purchasers of the bills of lading and the charter-party are to be regarded in no other or better position than if they had been charterers originally instead of assignees with notice (*Carver, Carriage by Sea* (3d Ed), p. 160; *Pollard* v. *Vinton*, 105 U. S. 7; *The Asphodel*, 53 Fed. R., 835; *The Chadwicke*, 29 Fed. R., 521).

If this clause, then, is considered by itself for the moment, it is seen that the contract was not a simple one to carry a cargo from Java to New York, and there discharge it "in such dock as directed by charterers." Even in such a case it is not believed that the charterers would have had a right to select a dock which the ship could not safely reach.

The contract, in fact, was one which gave the charterers a choice of a wide range of ports, at any one of which they might have ordered the ship to discharge. The clause must be taken as drawn generally to meet any possible contingency that might arise in the event of discharge at any

particular port. Within this range of ports there doubtless are many bridges of much less height above high water than the Brooklyn Bridge. It cannot be presumed that under the language here used the shipowners intended to give the consignees the right to order the vessel to discharge above such a bridge, which would have compelled her to unship her masts or cut them in two, or incur the expense of lighterage however great that might be. The language of the clause does not suggest any such intention. There is nothing in the charter-party from which it can be gathered, yet it is in effect the claimants' contention.

It logically results from the decision of the Court of Appeals that when once the vessel has safely reached a port, the charterers' obligation is satisfied and they may then order the vessel to proceed to any dock where some vessels customarily go, if only the particular vessel can be afloat at it. And the fact that to reach this dock the vessel might be obliged to cut several feet off her masts, or indeed, become completely dismantled, would not excuse her from complying with the order, or from bearing the cost of getting the cargo to the designated place by some other method, as by lighters, as in this case. Such a result seems so inequitable that it should be avoided unless it should be necessitated by a mandatory construction of the charter.

So far as an alternative method of discharge is concerned, there was no other, practically, than the use of lighters.

The suggestion was made at the trial for the first time that the designated dock was accessible by way of the Long Island Sound, and that the Benlarig, on receiving orders to discharge at the refinery above the Bridge, should have sailed out through the Narrows, around Long Island and Montauk Point and then through the Sound and Hell Gate to the dock at the refinery.

The idea is rather whimsical under the circumstances. It certainly was never put forward by the claimants themselves during the negotiations, and no request for such procedure was ever made by them to the libelant.

Referring to this suggestion the District Court said (p. 82):

> "There were but two means of escaping this mutilation of the masts for the purpose of discharging the cargo; first by approaching New York from the east, through Hell Gate. All shipping experts called by the claimants testified that they had never heard of a ship from Java pursuing that course. It may, therefore, be concluded that such alternative was contrary to the expectations and understanding of all parties to this contract, or of any other contract for the carriage of sugar from Java. The remaining alternative was to lighter the sugar."

This finding is concurred in by the Court of Appeals (p. 89), and may fairly be regarded as conclusive.

The question then is whether the vessel was bound to have her steel masts cut as the only means by which she would be enabled to reach the pier selected for her. The very statement of

the question would seem to carry with it a negative answer.

The claimants proved in their own evidence that the owners of the Benlarig knew as early as 1893 that the vessel could not pass underneath the Bridge (*Rossen*, p. 80).

There is no evidence to show that the claimants knew the height of the Benlarig's masts. They contend indeed, as stated in their brief in the court below (p. 17), that they

> "had no reasonable way of ascertaining such height. There was no circumstance to put them upon their inquiry. Masts of such height in one piece are so rare as not to charge merchants with the responsibility of investigation."

But if it be assumed, as may well have been the case, that the claimants bought the cargo and the ship's documents in ignorance of any of the details of the construction of the Benlarig, yet they had no right to make any assumption whatever at the risk of the shipowner, as to the height of the vessel's masts. The owners made no representation, and certainly it cannot be urged that the claimants bought the documents of the ship and cargo on the understanding that she belonged to any particular class of vessels of any height of masts or depth of keel that might be familiar to them. The claimants may well have been ignorant in fact, but that should be no reason to charge the owners with responsibility therefor.

Indeed it has been held by high authority that the charterer will be presumed to know the size

and characteristics of the vessel. In *Belmont* v. *Tyson*, 3 Blatchf., 530; 3 Fed. Cas., 150, where the shipowner had sued the charterer for failure to supply a full cargo to the vessel at Apalachicola, Mr. Justice Nelson, said:

"It is insisted on the part of the charterer, that he was not bound to furnish cargo beyond the quantity which the vessel could receive within the passes, and get safely out to sea. The owner claims, however, that he was entitled to have a full cargo, and that the charterer was bound to furnish outside the remainder necessary to complete it; and this upon the principle that *the charterer must be presumed to have known the size and character of the ship*, and the state of the harbor at the place of loading, and that a full cargo could not be put on board unless a part of it were to be taken in outside of the passes."

The decree of the District Court in favor of the libelant was affirmed.

The relative rights of the shipowner and charterer or consignee under this contract had been fixed before the claimants became parties. Their ignorance of the extent of the obligations assumed by them by their purchase of the contract cannot relieve them from liability for due performance of their burden under the contract.

The District Court cogently found on this point as follows (p. 82):

"Before considering the charter-party it should be stated that the ship had been before at the port of New York and the owners well knew that she could not pass under the Bridge without disturbing her masts. It is not understood that the charterers had this knowledge. On the other hand there is no notice to the ship that it would

be necessary to discharge the cargo above the Bridge, although, in fact, about seventy-five per cent. of the sugar now received at this port is so discharged. If this knowledge of the owners be urged against them it may be answered that for this very reason they may have considered themselves protected by the terms of the charter-party, and, in fact, all previous notice or understanding by either party must be regarded as merged in the charter-party and to the interpreting of that instrument resort must be had to ascertain the relative rights."

In view of such knowledge therefore it would be folly to suppose that the owners would intentionally agree to have the vessel go to a dock which she could not safely reach.

The charter shows that they did not make any such agreement. The language of the clause (*ante*, p. 11) provides several well defined restrictions governing the choice by the charterers of the place of discharge.

If these restrictions are considered by themselves in turn it is seen first that the place must be one where the vessel can discharge "always afloat."

There can be no dispute as to the meaning of these words. The vessel must be able to float at all times during the discharge, and this restriction carries with it the corollary that the vessel shall be able to float into the place and also to float out again after the discharge. Otherwise there would be no protection to the ship if she could not reach the place of discharge, or could not leave it afterwards, afloat.

The next condition is that the place of discharge must be "a safe port in the United Kingdom, or on the continent of Europe, between Havre and Hamburg, both included, Rouen excluded."

These words show that the port selected must be a safe one within certain territorial limits. Rouen is expressly excluded, whether as unsafe or for any other reason, but the safe and unsafe ports are not otherwise specified. Evidently, whether a particular port was safe or unsafe was a matter to be determined by the circumstances of the case. Indeed, Hamburg was included within the territorial option without a determination of the question of its safety, although it has been judicially held that Hamburg is not always to be regarded a safe port (*Hayton* v. *Irwin*, 4 Asp., N. S., 212; in the Court of Appeal.)

In the third place the charterers might, at their option, order the vessel to discharge at any one of four ports named, New York, Boston, Philadelphia, or Baltimore, but there is the further restriction, that may well be regarded as applying to all that part of the clause that precedes and to include any port to which the vessel might be ordered: "or so near the port of discharge as she may safely get."

This is a plain recognition that the vessel may not be able to reach the place of discharge, and if so, she need proceed only so far as she can safely get. If the influence of the restriction be confined to the four named ports in the United States it is all the more significant.

If the vessel should not be able to reach safely the place of discharge, we should expect to find some provision with regard to the liability for the expense of discharge of the cargo from the vessel in her more or less distant position. There is such provision in the lighterage clause 4, but this will be considered hereafter.

The next condition is almost a repetition of the first, and that is that she shall "deliver the same always afloat, in a customary place and manner."

The District Court construed this phrase as indicating that the discharge should be in a customary place and manner, when the dock shall have been reached (p. 83), and this view is doubtless correct.

The Court of Appeals did not refer to this construction, beyond holding that the dock to which the vessel was ordered was a customary place for the discharge of sugar (p. 90).

The claimants insisted that the District Court was in error in the view taken by it, and that they had complied with all their obligations by merely designating a customary place of discharge.

The claimants' contention, however, would in effect, remove the phrase from its context, and would regard the requirement that the discharge should be in "a customary place and manner" as constituting the only protection sought by the shipowner, rather than as forming merely one of several qualifications on the receivers' right of selection that otherwise might be claimed by them to be unrestricted.

The probability is, however, that the words "in a customary place and manner" have little bearing on the point here in controversy. The complete phrase is "deliver the same always afloat, in a customary place and manner, in such dock as directed by the charterers." The words, "in a customary place and manner," qualify the words "in such dock," and are evidently intended to apply to cases where, as in England and Holland, docks are enclosed by tide gates, and there are many berths in the same dock (*Dall'Orso* v. *Mason*, 3 Scotch Sessions Cases (4th Series), 419; *Dahl* v. *Nelson*, 6 App. Cas., 38; *Pyman* v. *Dreyfus*, 24 Q. B. D., 152; *Carver, Carriage by Sea* (3d Ed.), Sec. 624 *b*).

The language in this entire clause has frequently been the subject of judicial decision, and it has been held that a vessel would not be bound to lighter cargo in order to get to the port or place of discharge, nor to enter a port to load if she would be compelled to lighter cargo in order to leave. A few of these decisions are here referred to.

The Alhambra (1881), 6 P. D., 68, in the Court of Appeal, was a case where the charter-party provided that the vessel should go "to a safe port in the United Kingdom * * * or as near thereunto as she could safely get, and always lay and discharge afloat. * * * Lighterage (if any) always at the risk and expense of the cargo."

The vessel received orders to proceed to Lowestoft and there discharge the cargo. The vessel's draught was 16 feet 6 in. The average high water in Lowestoft harbor was about 16 feet and average low water about 11 feet. When the master objected to discharging in Lowestoft the purchasers of the cargo gave him notice that they were prepared at their own expense to lighter the vessel in Lowestoft Roads sufficiently to enable her to lie always afloat in Lowestoft harbor, if necessary, should her draught of water so require. The master declined this, however, and went to Harwich as the nearest safe port and discharged the cargo. The owners of the cargo brought suit for breach of contract and at the trial it was shown that it was the custom for vessels which were too deep to enter the port of Lowestoft to discharge a portion of their cargo in the Roads outside, and that it could be done with reasonable safety.

Judgment was given for the plaintiffs. On appeal the judgment was reversed. It was held that Lowestoft was not a safe port for the vessel within the meaning of the charter-party and that the custom shown by the charterers was inadmissible.

JAMES, *L. J.* (p. 74), said:

"That is the place to which she has contracted to go. She has not contracted to go somewhere something like it, or with a little variation from it, or a little change from it which the party ordering her to go may require. The master says, 'No, you must name me a port and I will go to that port if I can get there, and if from any accident afterwards, or from any cause not my own fault I cannot get there, I will get as near thereto as I can safely get

still complying with the conditions given me at first; that is to say, to go to a port where I can get and safely lay and discharge afloat."

COTTON, *L. J.*, said (p. 74):

"A safe port here means a port safe for this vessel loaded, that is to say, one into which such a vessel loaded can safely get."

In *Reynolds* v. *Tomlinson* (1896), 1 Q. B., 586, the language in the charter-party was that the vessel should proceed to one of several named ports "for orders to discharge at a safe port in the United Kingdom * * * discharge to be given with dispatch according to the customs of the port of discharge and to be all at one port * * * Charterer's agent to have the privilege of naming the discharging dock. * * * The dock to be one into which the vessel can at once safely enter and lie afloat at all times."

The vessel received orders to discharge at Gloucester. The town of Gloucester and the Gloucester Basin are approached by a canal. The ship with her cargo on board drew 18 feet, while the depth of the canal accommodated vessels of not more than 14 feet draft. In order to get up the canal to Gloucester the vessel would have had to discharge at Sharpness at the entrance to the canal, 465 tons out of a total cargo of 1069. The charterers required the master to lighten the ship to that extent at Sharpness and then proceed to Gloucester to discharge the remaining cargo. The master refused to do this and discharged the whole cargo at Sharpness. The charterers sued

the shipowner for the excess cost of the discharge of the 604 tons into lighters above what it would have cost to discharge that amount at the dock at Gloucester.

At the hearing the Judge found that there was a custom at the port of Gloucester, according to which ships employed in the grain trade, if of too great a draught to navigate the canal, were invariably lightened by the discharge of part of their cargo at Sharpness, and then proceeded to Gloucester with the remainder. He also found that for fiscal purposes Sharpness is in the port of Gloucester, though in a commercial sense Gloucester and Sharpness are distinct ports. Judgment was given for the charterers, but on appeal the judgment was reversed. The Court said, DAY, *J.* (p. 589):

"The charter-party provides that the port to which the ship is ordered to go must be a safe port. The port to which she was in fact ordered to go, was Gloucester, and that was in my opinion, not a safe port for this ship for she could not get safely there with her cargo * * *."

(p. 590): "He had got as near to Gloucester as he could safely get and was entitled to call on the consignees to take delivery at Sharpness."

The Court held under the authority of the *Alhambra*, 6 P. D., 68, that the evidence of the custom to lighten the ships was inconsistent with the provision of the charter-party, that the port of discharge should be a safe port.

In *Shield* v. *Wilkins*, 5 Welsby H. & G. (Exchequer), 304, the charter-party provided that the vessel should proceed to Riga "or as near thereto

as she could safely get," and there load a full cargo of fir timber. The vessel arrived inside the bar at the port of loading and loaded all the cargo she was capable of taking, consistently with her being able to get out of the harbor over the bar. The charterers refused to give any cargo outside the bar at the charterers' expense, and the shipowner brought an action for dead freight.

The court held that the plaintiff was entitled to recover. It was said by ROLFE, B., at page 304:

"It is perfectly clear what the meaning of this contract is—that the vessel cannot be said to get safely to that place from which she cannot safely get away with a full cargo. The word "safely" means safely as a loaded vessel. Suppose the place to have been such that she could not have taken in with safety to herself a single deal, that would not have been a place whereto she could safely get; and, consequently, as she could not safely get away from within the bar with a full cargo, that was not such a place within the terms of this charter-party."

In *The Nifa*, 1892 Prob. Div., 411, the charter-party provided "the cargo to be brought to and taken from alongside the ship at merchants' risk and expense, where she can lie always afloat and safe * * *, and being so loaded shall therewith proceed to Yarmouth, Norfolk, or so near thereto as she may safely get, and deliver the same always afloat * * *. The cargo to be supplied as fast as steamers can load and stow same and discharge as fast as steamers can deliver and according to custom of the respective ports." The vessel arrived and was moored 15 feet from the

quay, which was the nearest position the ship could reach always afloat. To enable the cargo to be discharged it was necessary to have a staging built. For the extra cost of the discharge in this manner, the shipowner brought an action against the charterers.

The defendants at the trial set up a custom at the port by which the vessel was to deliver on to the quay. Judgment was given for the defendants. On appeal the judgment was reversed. It was held that evidence as to the custom was not admissible. SIR FRANCIS JEUNE said (p. 417):

"It appears to me that you may very well say that the words 'according to the custom' in the latter clause do not modify 'at the merchants' risk and expense,' but may control the time and manner in which the cargo is to be loaded, stowed and discharged."

A. L. SMITH, *J.*, said (p. 418), as to the words "and according to the custom of the respective ports" as follows:

"I read those words as meaning the mode of loading and unloading, or it may be as to where the goods are to be delivered, but that does not contradict that part of the contract which is staring one in the face, namely, that the taking to and from the ship's rail is at merchants' expense. I say in my view this is a clear case."

In *The Gazelle*, 128 U. S., 474, the charter-party provided that the vessel should proceed from Baltimore "to a safe, direct Norweigian or Danish port as ordered on signing bills of lading or as near thereunto as she can safely get and always lay and discharge afloat."

The charterers tendered to the master for signature bills of lading ordering the vessel to the Port of Aalborg in Denmark as the port of discharge "to be landed at Aalborg, or as near thereto as the vessel can safely get." The master refused to sign for the reason that Aalborg was not a safe port. Aalborg is situated in Denmark on the south bank of the Limiford, and about 17 miles from its mouth. Owing to a bar at the mouth of the river, there is a depth of water of 10 or 11 feet only. The draft of the Gazelle loaded was about 16 feet. The only place of anchorage for a vessel that cannot cross the bar is off the mouth of the river, where vessels were accustomed to discharge into lighters.

Subsequently the master filed a libel for demurrage to the vessel. Judgment was given for the libelant. On appeal the decree was affirmed. This court, speaking by Mr. Justice Gray, said (p. 486):

"By the express terms of the charter-party, the charterers were bound to order the vessel 'to a safe, direct, Norwegian or Danish port, or as near thereunto as she can safely get and always lay and discharge afloat.' The clear meaning of this is that she must be ordered to a port which she can safely enter with her cargo, or which, at least, has a safe anchorage outside where she can lie and discharge afloat. *Dahl* v. *Nelson*, L. R. 6 App. Cas., 38; *The Alhambra*, *L. R.* 6 P. Div., 68. The charterers insisted upon ordering her to the Port of Aalborg. The circuit court has found that Aalborg is in a *fiord* or inlet having a bar across its mouth, which it was impossible for The Gazelle to pass, either in ballast or with cargo; and that

the only anchorage outside the bar is not a reasonably safe anchorage, nor a place where it is reasonably safe for a vessel to lie and discharge.

"These positive findings of essential facts are in no way controlled or overcome by the other statements (rather recitals of portions of the evidence than findings of facts) that large English steamers habitually, and thirty-one American vessels in the course of several years had, in fact, discharged the whole or part of their cargoes at that anchorage, without accident or disaster. A dangerous place may often be stopped at or passed over in safety."

The charterers offered to prove that by the uniform and established custom of trade between Baltimore and other Atlantic ports and ports of Norway and Denmark, Aalborg was recognized as being and understood to be a safe, direct port of Denmark within the meaning of such charter-party. The Court held that "evidence of a custom to consider as safe a particular port, which, in fact, is not reasonably safe, would directly contradict the charter-party, and would, therefore, be incompetent as a matter of law.

In *Hayton* v. *Irwin*, 4 Aspinall, N. S. 212 (in the Court of Appeal), the charter-party provided that the vessel should proceed "to a safe port in the United Kingdom or on the Continent, between Havre and Hamburg, both ports included, as ordered * * * or so near thereunto as she can safely get * * * The cargo to be brought to and taken from alongside the ship at merchant's risk and expense."

The vessel was ordered to discharge at Ham-

burg and her draught was too great to allow her to get up the river higher than Stade, and she could not reach Hamburg. Part of the cargo was lightered at Stade and carried to Hamburg, and the balance of the cargo was taken up in the vessel after she had been lightened.

The shipowner sued the charterers for the expense of lighterage. The charterers set up a custom of the port of Hamburg by which he was not bound to accept any part of the cargo at any other place than Hamburg. It was held that the custom could not override the charter-party, and judgment was given for plaintiff, and on appeal was affirmed.

It is particularly to be noted in this case that Hamburg was included by name in the range of ports to which the charterers might order the vessel to proceed. It is clear that it was considered that Hamburg might or might not be a safe port according to the circumstances of the vessel. In fact, it appeared that Hamburg was not a safe port for the vessel within the language of the charter.

If the limitations referred to in these cases apply to a safe port they would seem to apply with equal force to the place of discharge or a safe dock in the port, for there can be no distinction in reason between a port that has but one dock or place of discharge and a port that has several docks, some of which are safe and some unsafe for the vessel. What the ship is entitled to demand

in each case is safety. Indeed, one of the claimant's witnesses said that the language of the clause by custom gave the charterers the right to order the vessel to a *safe* dock (*Elliott*, p. 63).

The result of these decisions is that charter-party provisions are to be construed with reference to the vessel which is the subject of the contract.

This is so far the natural and indeed elementary view to be taken in the construction of a contract that it would be utterly unnecessary to suggest it were it not for the fact that the claimants' argument disregards and in fact denies it and their position is supported by the Court of Appeals.

The claimants stated in their brief in the Court below (p. 6):

> "We may concede that they [claimants] could not require her to attempt to reach a dock in an unusual location, or one which vessels of her class could not ordinarily reach with safety."

But they claimed that the Arbuckle dock was a customary place of discharge for "vessels of like size and like cargoes, having the usual attributes which strangers to a vessel may assume she possesses, or are charged with knowing that she possesses" (p. 8 *of same brief*), and that in consequence the ship could not properly refuse to go there.

The Court of Appeals said (p. 90):

> "The Arbuckle dock was a safe one where she could be always afloat, and a customary place for the discharge of sugar,"

and that the vessel was bound to deliver there or pay damages for her refusal.

It is submitted that this reasoning is altogether erroneous.

Charter-parties are contracts between the ship-owner and the charterer having in view particular circumstances and certain specified vessels. In contracting for the use of a named vessel the charterer has in view that vessel and not some other vessel. But for the decision in question here it would seem almost a work of supererogation to state that where the owners chartered their vessel they contracted with reference to that vessel. They were not concerned with and doubtless did not consider the possible or probable capabilities, with respect to various ports in the world, of a wholly supposititious and indeterminate class of vessels that might be regarded as having one or many features in common with the ship that was the subject of the contract.

They made a contract for their ship, the Benlarig, and the terms of the contract require that the place designated for her discharge must be a safe one *for her*, and one where she may discharge always afloat (*Atkins* v. *Fibre Disintegrating Co.*, 2 Ben. 381, 385; 2 Fed. Cas; 78, 79).

The Arbuckle dock was not a safe place of discharge for the Benlarig, for she could not reach it in safety, nor could she safely leave it. She would have had to lose about ten feet of her steel masts in order to proceed loaded under the Bridge. On her return after discharging her cargo, at least

ten feet more would have had to be cut from the masts, unless a return cargo could have been secured above the Bridge.

The District Court said in this connection (p. 84):

"It is thought that it is the privilege of the ship to be preserved from self-mutilation and that she need not be crippled, deformed, or dismantled, for the purpose of delivering her cargo. Apparently that should never be required. It should not be expected."

To hold to the contrary as the Court of Appeals did would seem almost unreasonable.

The claimants contend that the phrase "to deliver the same always afloat" means simply that there shall be sufficient water at the dock for the ship to lie afloat, and for her to float up to the dock, irrespective of obstructions under water or in the air. So far as the vessel and her safety are concerned it would seem to make no difference in what direction the danger lay.

The Brooklyn Bridge would be no more unsafe for her if it was but 35 instead of 135 feet high. Nor would the Arbuckle dock have been less accessible to her if there had been a bar at a considerable distance from it, causing too shallow water for the vessel, as in *The Gazelle*, 128 U. S., 474, referred to above.

Or let it be supposed that the Brooklyn Bridge was a drawbridge and not more than 25 or 35 feet above the water instead of 135. If the width of the draw was sufficient to enable the large

majority of all the vessels in the world to pass, but yet it was too narrow by only a few inches for the Benlarig, can it be supposed that she would be required to shave a few inches off her side planking to enable her to get through or else pay the cost of lightering the cargo?

Or if there was a drawbridge through which in ordinary course any ship might pass, but the draw was not in working order and could not be opened at the time the dock was designated to the vessel, must the ship bear such risk, and if she cannot reach the designated dock, though by no fault of her own, must she pay the expense of lightering the cargo though she is ready to discharge directly at any dock she can safely reach?

As the District Judge suggests (p. 83):

"The ship could not be ordered to a slip which was too narrow to receive her or where there was some overhanging shed or house that would prevent. So if the entrance to the dock were obstructed, or there was other interference with the discharge at the place designated."

But under this "class" decision of the Court of Appeals, if there was such overhanging shed, and it was high enough to clear the masts of almost all vessels, but not sufficiently high to allow the Benlarig to lie at her dock, the ship must cut her masts, or pay to have her cargo lightered.

Or, again, if there was a bar in front of the dock, but yet sufficient water for almost all vessels to pass, but not enough for the Benlarig, must the ship then lighter at her own expense so much cargo as may be necessary to enable her safely to

reach the designated place of discharge? The claimants would not so contend.

Indeed in their brief in the Court below (p. 12) the claimants admit that the ship would be excused if she should be ordered to a place "which by reason of some permanent physical obstacle, was inaccessible both to the Benlarig and to vessels of her size and class." But the claimants had no contract with respect to any class of vessels, but only with the Benlarig.

The effect of an obstruction other than one under water was considered in *Williams* v. *Theobald*, 15 Fed., 465. The charter there provided that the cargo was to be "delivered alongside any * * * wharf or pier as may be directed by the consignees." The consignees named a wharf that owing to its crowded condition was inaccessible to the vessel for a longer time than that provided by the charter.

The question was one of demurrage, for which the consignee was held liable, but in discussing the general subject, Hoffman, *J.*, said (p. 467):

> "It appears to be well settled in England that where by a charter-party a ship is to be brought to a particular dock, or as near thereto as she may safely get, and she is prevented from getting to her primary destination *by any permanent obstacle* other than an accident of navigation, the shipowner is entitled to damages for the detention by reason of the charterers' refusal to receive the cargo at the alternative place of delivery, although the obstacle which prevented her from getting into the docks (viz., their crowded state), was not an obstacle endangering her safety."

A case singularly like the present one in its circumstances came before the Divisional Court in England, after the date of trial of this case.

The case is *Re An Arbitration between Goodbody & Co. and Balfour, Williamson & Co.*, 8 Asp. Mar. Law Cas., 503. The case is also reported in 4 Com. Cas., 119. The decision was affirmed by the Court of Appeal in 5 Com. Cas., 59.

This case is referred to at length by the District Judge (p. 84) who found the facts in the two cases to be equal (p. 85). The Court of Appeals disregarded the case on the statement that the facts were different. It may, therefore, be advisable to refer to the case in detail.

The facts were that a cargo of wheat per the ship Vanduara, had been sold by Balfour, Williamson & Co. to Goodbody & Co.

The contract contained the clause: "Shipped * * * per Vanduara * * * sailed, or about to sail, as per bill or bills of lading dated or to be dated accordingly * * * *to any safe port* in the United Kingdom of Great Britain and Ireland, or to Havre or to Dunkirk or to Antwerp, calling at Queenstown, Falmouth or Plymouth, for orders as per charter-party, vessel to discharge afloat."

When the documents for the cargo were received it was found that by the terms of the bills of lading the cargo was stated to have been shipped upon the Vanduara "to discharge at a safe port in the United Kingdom, Manchester excepted." The vendees declined to take up the documents on the ground that they did not comply with the contract for delivery in any safe port in the United Kingdom.

It was found in the special case stated for the decision of the Court that—

"the *Vanduara* when loaded with the said cargo would have been unable to go up the Manchester Ship Canal to the Manchester Docks, *because the heads of her lower main and mizzen masts would have been higher than the limit fixed by the Canal Company's regulations for passing under the Runcorn Bridge*" (p. 504).

The vendors contended that the addition to the bills of lading of the words "Manchester excepted" was immaterial, inasmuch as Manchester, in any event, was not a "safe port" in the sense of the bills of lading, as the ship could not reach it without cutting off or taking down her mast. The Court so held, and determined that the tender of the documents containing the clause "Manchester excepted" was a good tender under the contract. Bruce, *J.* (p. 506), said:

"It is found as a fact that the *Vanduara* when loaded with the said cargo would have been unable to go up the Manchester Ship Canal because the heads of her lower main and mizzen masts would have been higher than the limit fixed by the canal company's regulations for passing under Runcorn Bridge. It would be necessary to dismantle the ship to enable her to get under Runcorn Bridge. Runcorn Bridge is about twenty-four miles from Manchester, and about twelve miles from the entrance of the canal. Runcorn Lay-bye consists of an embayment which was made by the Manchester Ship Canal Company in their canal between the town of Runcorn and the old river bed, and affords capabilities for a vessel up to 5,000 tons to discharge cargo there. It was contended on behalf of the sellers that Manchester was not a safe port for the

Vanduara, because the height of her masts prevented her getting to Manchester, and that therefore the words in the charter-party and the bill of lading 'Manchester excepted,' did not amount to a variance from the terms of the contract, because, as Manchester was not a safe port for the ship, she could not in any case have been ordered there."

The learned Judge further added (p. 507):

"If the words 'Manchester excepted' have acquired this meaning (that Manchester and the waters adjacent thereto are alone excepted), *Manchester was not a safe port for the Vanduara. She could not have been ordered to Manchester in any case, because she could not have got under Runcorn Bridge*, and the presentation of documents containing the words 'Manchester excepted' imposed no restriction upon the purchaser inconsistent with the terms of the contract of purchase. * * * I may observe that the contract was for a cargo per *Vanduara*, a named ship, and, if in point of fact Manchester was not a safe port for her, it does not seem to me that the defendants were in any way prejudiced by a phrase being introduced into the documents which abridged none of their rights, and imposed no restriction which was not imposed by the terms of the contract itself."

On appeal the judgment of the Divisional Court was affirmed (5 Com. Cas., 59). A. L. Smith, *L.J.*, said (p. 66):

"It is abundantly proved that Manchester, taken by itself, was not a safe port for this vessel, because it was found as a fact * * * that it would have been necessary to dismantle the ship to enable her to to get under Runcorn Bridge, which is the first bridge vessels going up the canal to Manchester have to pass." And at page 67:

"On the findings of fact in this case I am

clearly of opinion that it was quite immaterial whether the words 'Manchester excepted, were or were not in the shipping documents."

Collins, *L. J.*, said (p. 67):

"If Manchester was not a safe port, the addition of the words 'Manchester excepted' did not alter the contract. It is, therefore, necessary to ascertain whether Manchester was or was not a safe port, and it seems to me that no difficulty arises on that question when once the boundaries of the port of Manchester have been ascertained."

Vaughan Williams, *L. J.*, said (p. 69):

"On the findings of the last award it is perfectly plain that in a commercial sense, the port of Manchester in that sense was not a safe port for the *Vanduara* to go to."

It is to be noted that the Vanduara would no more have had to be dismantled to pass under the Runcorn Bridge than would the Benlarig to pass under the Brooklyn Bridge.

In both cases the vessel's masts would have had to be cut. This circumstance was sufficient in the English case to keep Manchester out of the class of safe ports for the Vanduara, though Runcorn Laybye below the bridge was part of the port of Manchester and could accommodate vessels not exceeding 5,000 tons.

The case in effect decides that an obstruction in the air which bars access to the place designated for the discharge, quite as effectively prevents it from being safe for the ship as if the obstruction were a sand bar or any other obstacle below the water.

Full force and effect may be given to the contract by limiting the scope of the words to the construction above outlined. In the port of New York there are half a dozen miles of piers perfectly suitable for the discharge of Java sugar. The shipowner did not know, at the time the charter was made, that the sugar was to be delivered in the port of New York, much less at a particular place in the port above the Brooklyn Bridge. The charter-party and the cargo had passed through several hands before their ownership vested in the claimants, Arbuckle Bros. If Czarnikow, Macdougall & Co., who apparently owned the cargo when the ship came into port (p. 22) had not found an immediate market for it at one of the refineries, it would in the ordinary course have been stored in some of the warehouses below the Bridge. Under all these circumstances, therefore, it is most unreasonable to suppose that the parties to the contract ever contemplated that they were binding the ship to discharge at a place in the port of New York which she could not reach on account of permanent obstacles.

One other contention of the claimants should here be referred to and that is that by custom in this port under the clause just considered, the ship was bound to deliver her cargo at the designated place, even though the vessel's masts could not be lowered so as to pass under the bridge.

The District Court found (p. 82), that :

"It is quite exceptional for a ship to have immovable masts so high that she cannot pass under the bridge, and there is no custom or practice known among shipping merchants respecting such a case."

The Court of Appeals concurred in this finding (p. 89):

"There is no custom in the port of New York respecting the course to be pursued by vessels directed to discharge above the Bridge, which have immovable masts too high to permit a passage beneath the Bridge."

In view of this concurrent finding the contention with regard to custom will probably not be pressed in this Court.

SECOND POINT.

UNDER THE LIGHTERAGE CLAUSE THE RECEIVERS OF THE CARGO MUST BEAR THE EXPENSE OF LIGHTERING THE CARGO TO THE DOCK WHICH THE VESSEL COULD NOT SAFELY REACH.

If there could be properly any doubt on the construction of the previous clause in the charter, it is altogether removed by the form of the lighterage clause 4, and it is submitted that the Court of Appeals committed a grave error in the construction that they put on it.

The lighterage clause in the charter-party was in these words:

"4. All goods to be brought to and *taken from alongside* of the ship, always afloat, *at the said*

charterers' risk and expense, who may direct the same to the most convenient anchorage; *lighterage*, if any, *to reach the port* of destination, *or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding*" (p. 5),

It is to be noted at the outset that under this clause the goods are to be taken from alongside the ship "at the charterers' risk and expense." This language is clear and unequivocal. Taken in connection with the rest of the charter-party, it is a stipulation by the charterer or consignee that when the vessel has gone so near the place of discharge as she can safely get, the expense of taking the cargo from alongside, however it shall be taken, shall be at the charterers' risk and expense.

It has never been contended by the claimants that the Benlarig could reach safely the place of discharge. As the District Court held (p. 83), "lighterage was necessary for the purpose of delivering this cargo." The expense of this lighterage was one that the consignee stipulated by these words, to pay (*Carr* v. *Austin*, 14 Fed. R., 419; *The Nifa* (1892), Prob. 411).

The claimants have not suggested that the clause does not apply to the situation here presented.

The words are not referred to by the Court of Appeals.

Any possible doubt of the application of the phrase, however, is removed by the language of the balance of the whole clause.

The Court of Appeals say, speaking of this clause as a whole, that it is

"a well known provision, and was introduced into charter-parties originally to provide for the payment of lighterage when the vessel was unable to deliver the cargo at a dock to which she had been assigned from a cause to which vessels generally might be expected to be subject, such as shoal water or a bar" (p. 91).

A lighterage clause in some form may be a well known provision in charter-parties but it is entirely clear from the testimony of the claimants' witnesses that the form of the clause used here is most unusual (*Snow*, p. 56; *Elliott*, pp. 64-65). One of the witnesses claimed to be familiar with the clause, and said that it had been construed by custom to become operative only where there was not sufficient water at the dock to enable the vessel to float. He was unable, however, to give a single instance where that interpretation had been given to the clause (*Mac Dougall*, p. 49).

Still another witness claimed that the clause was in the usual form because he interpreted it as having the same meaning as other words that ordinarily were used instead of those found here (*Smith*, p. 59).

The usual form of the clause apparently is "Lighterage, if any, to be paid by the charterers" (*Snow*, p. 56).

This is also seen by reference to the cases previously cited.

The clause in this charter-party is unusual in

two particulars in that it provides (1) that the receivers are to pay for the lighterage, if any be necessary, *not only to reach* the port of destination *but also to deliver* the cargo at port of destination; and (2) that the lighterage shall be for account of the receivers "any custom of the port to the contrary notwithstanding."

It would seem difficult to imagine a more explict stipulation that the receivers should pay for any necessary lighterage.

As the District Court said (p. 84) with regard to this clause:

> "It is useless to conjecture respecting these stipulations, where they are, as in the present case unambiguous. It is better to take words at their apparent ordinary meaning, and hold parties to their agreement according to the plain sense of the language used. Adopting such rule the libelant should recover."

In face of these explicit provisions, no evidence of a custom for the *ship* to pay lighterage would be admissible (The *Nifa* [1892], Prob., 411; 7 Asp., 324; *Holman* v. *Wade*, London *Times*, May 11, 1877, cited in the *Nifa*, 7 Asp., at p. 325; *Hayton* v. *Irwin*, 5 C. P. D., 130; 4 Asp., 212; *Lishman* v. *Christie*, 6 Asp., 186, 188; 19 Q. B. D., 333, 337).

Both Courts below have found that there was no custom in the port under this clause. If there had been such custom, evidence of it would have been excluded by the language of the clause (*Brenda S. S. Co., Ltd.*, v. *Green* (1900) 1 Q. B., 518, in the Court of Appeal).

The Court of Appeals further found that the owners knew, or had reason to know, of the height of the Benlarig's masts, "but did not insert a provision in the charter that she should not be required to go above the Bridge, but preferred to rely upon Article 4" (p. 91).

This is a distinct finding that the owners thought that the language of the lighterage clause protected their vessel from going above the Bridge, and intended that it should do so. It is wholly irreconcilable with any notion that they could have intended to undertake to deliver above the Bridge. The stipulation itself is perfectly clear and unambiguous, and is an explicit agreement that if any lighterage is necessary, either to reach the port of destination, or deliver the cargo at the port of destination, the cost of such lighterage shall be paid by the receivers, any custom of the port to the contrary notwithstanding.

It must be remembered that the owners did not know when the charter-party was effected that the vessel was going to New York. The charterer might have ordered the vessel to any one of many ports. It may very well be that if any particular port had been contemplated, special provisions would have been put in to that effect; but as this was not the case, the provisions of the charter were made general to protect the ship in any contingencies that might arise. Even after the vessel arrived at the port of New York, there were a half dozen miles of piers on the North River, or on the East River below the Bridge which were perfectly suitable for the discharge of

Java sugar, and where the vessel could have discharged in safety.

Nor is it any hardship whatever on the receivers that they should be held strictly to the terms of the documents which they bought, for the bills of lading expressly included all the conditions and exceptions of the charter-party.

It is alleged by the claimants that the construction contended for by the libelant would lead to the position that the ship could insist on discharging as soon as she reached a place from which lighterage was feasible. But this is not so. If a safe dock for the ship is designated she must go to it, and it is only where such a dock is not selected and lighterage becomes necessary that it has to be incurred.

Nor is there any further warrant for the suggestion that the lighterage clause becomes applicable only where the ship has performed her whole duty under this contract. The determining question in the case is whether the ship has performed all she was bound to do. That question must be considered with reference to the entire contract, of which the lighterage clause is a part.

Whatever the purpose for which a lighterage clause in some form may have been introduced in other charter-parties, the form of it as it occurs here was adopted by the owner to meet the circumstances of his own vessel, and must be regarded as expressing the agreement of the parties at the time it was made.

Although they used language that aptly covered circumstances that might be and actually were en-

countered, the Court of Appeals refused to allow them the benefit of this contract. Their reasoning is stated at page 91:

"The case is that of the claimed application to novel circumstances of a clause intended for a different set of circumstances, and is as if a vessel unable by reason of its novel construction to reach a dock which ninety-nine per cent. of vessels do reach, should desire to place the expenses of lighterage upon the charterers under article 4. Such an attempt would be and *the facts of this case are within the letter of the article, but not within its spirit.*"

There is absolutely no evidence in the case outside the charter-party and bills of lading themselves, to indicate what the owners and the charterers intended by the language used, nor is there any warrant for the finding that the clause was intended for any other circumstances than those embraced by its language.

It is respectfully submitted that the finding of the Court of Appeals is an attempt to change the contract actually made by the shipowner for some other contract more favorable to the receivers of the cargo which the Court thought should have been made, and that it constitutes a most unwarrantable invasion of the shipowner's vested rights.

The distinction between the "letter" and the "spirit" seems to be the result of a visionary departure into a nebulous atmosphere. It is altogether beyond the comprehension of the shipowners, as practical men, and it is difficult to see how in the exercise of reasonable human foresight the difficulties suggested by this distinction could be provided against.

LAST POINT.

THE DECREE OF THE COURT OF APPEALS SHOULD BE REVERSED AND THE CAUSE REMANDED, WITH DIRECTIONS TO AFFIRM THE DECREE OF THE DISTRICT COURT, WITH INTEREST AND COSTS.

The attention of the Court is specifically requested to the question of interest on the amount of the decree awarded to the libelant for the balance of freight withheld.

This decree does not provide in terms that interest shall run from the date of the decree until the date of its satisfaction (p. 86).

If, therefore, this Court shall determine that the libelant was entitled to payment of the balance of freight withheld, in order to avoid any question of the right of the libelant to recover interest under the form of the original decree, or under the decree to be entered pursuant to the mandate of this Court, it is respectfully requested that the mandate shall direct that interest be computed on the amount of the decree from the date of its entry until the decree shall actually be paid.

Dated New York, October 27, 1902.

Respectfully submitted,

CONVERS & KIRLIN,

Proctors for Libelant.

J. PARKER KIRLIN,

CHARLES R. HICKOX,

Of Counsel.